(14) (13)

Nos. 89-1391, 89-1392

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP.,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

CONRAD K. HARPER
Counsel of Record
JANICE GOODMAN
DIANE S. WILNER
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street
New York, New York 10036
(212) 382-6600

DEBORAH M. BUELL
DONNA COSTA
JOSEPH RAVITCH
CLEARY, GOTTLIEB, STEEN & HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000
Attorneys for Amicus Curiae The Association of the Bar of the City of New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes and Regulations

Legislative Materials

INTEREST OF AMICUS[1]

The Association of the Bar of the City of New York (the "Association") is an organization of over 18,000 lawyers. While most members practice in the New York City metropolitan area, the Association has members in nearly every state and in forty countries. Two important purposes of the Association, as set forth in its Constitution, are "promoting reforms in the law" and "facilitating and improving the administration of justice."[2] The Association accordingly has devoted itself to supporting and defending reforms in the law in cases of

---

1 Letters of consent to the filing of this brief are being filed with the Clerk of the Court pursuant to Rule 37.3 of the Rules of this Court.

2 Constitution of the Association of the Bar of the City of New York, Art. II.

substantial public importance before the courts.

The Association is committed to the right of freedom of expression and believes that the challenged regulations[3] abridge the free speech rights of both health care professionals and their clients. The Association views a restriction of this nature, promulgated in this manner, as an alarming precedent for professionals who provide any form of counsel, as well as for the general public. Indeed, many lawyers, because they are employed by government-funded

---

3 The challenged regulations, 42 C.F.R. § 59, 53 Fed. Reg. 2,922 et seq. (1988) (hereinafter the "Regulations"), were adopted by the Secretary of the United States Department of Health and Human Services (hereinafter the "Secretary") pursuant to Title X of the Public Health Service Act, 42 U.S.C. §§ 300 et seq. (1982 & Supp. 1986) (hereinafter "Title X").

entities, may fear the imposition of analogous restraints on their freedom fully to advise their clients as required by state law and ethical obligations.

The Association is equally committed to the principle of individual liberty, including the constitutional right of women to make reproductive decisions, in consultation with their physicians, free from governmental coercion. The Association believes that, by imposing content-based restrictions on health care professionals' advice to their clients, the Regulations effectively deprive women of information necessary to exercise their constitutional right of reproductive choice.

These issues are of great significance to the Association. The Association, through its Committees on

Civil Rights and Medicine and Law,[4] therefore urges that the order of the Court of Appeals of the Second Circuit upholding the Regulations be reversed.

---

4 Conrad K. Harper, President of the Association of the Bar of the City of New York; Janice Goodman, Chair of the Committee on Civil Rights; Diane S. Wilner, Chair of the Committee on Medicine and Law.

SUMMARY OF ARGUMENT

By censoring the information that Title X providers may give to their clients, the Regulations impermissibly violate the First Amendment rights of health care professionals by placing content-based restrictions on professional/client communications, thereby interfering with the confidential relationship between health care professionals and their clients. By employing its administrative rule-making power to promulgate the Regulations in contravention of both the intent of Congress and the First Amendment rights of professionals, the Secretary has exceeded the scope and purpose of Title X and has illegally intruded upon the health care field.

ARGUMENT

THE REGULATIONS VIOLATE THE FIRST AMENDMENT RIGHTS OF HEALTH CARE PROFESSIONALS

A. The Censorship Prescribed By The Regulations Violates The First Amendment's Prohibition Against Content-Based Speech Restrictions

1. The Regulations Violate The First Amendment By Prohibiting Discussion Of Abortion

The First Amendment expressly forbids the government from restricting expression because of "its message, its ideas, its subject matter, or its content." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (city ordinance prohibiting non-peaceful picketing found unconstitutional). See Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) (content-based regulation of speech is violative of the First Amendment). The dissemination of information about

abortion in particular is a protected form of speech. Bigelow v. Virginia, 421 U.S. 809 (1975) (advertisement of abortion services is a form of expression protected by the First Amendment).[5]

It is not disputed that, under the Regulations, Title X providers are forbidden to speak about abortion. Even if a client asks for factual information about abortion, the professional may not provide such information or refer her to any source of abortion-related

---

5 See also YWCA of Princeton v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972) (statute forbidding a physician from prescribing or advising a woman to terminate her pregnancy chills First Amendment freedoms), aff'd, 493 F.2d 1402 (3d Cir.), cert. denied, 415 U.S. 989 (1974); Planned Parenthood of Chicago Area v. Kempiners, 568 F. Supp. 1490, 1495 (N.D. Ill. 1983) (statute denying funds to agencies providing abortion counseling and referral with private funds impermissibly penalizes free speech rights).

information.[6] Instead the client must be told only "that the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." 42 C.F.R. § 59.8(b)(5), 53 Fed. Reg. at 2,945. Thus, the Secretary has expressly censored all discussion of abortion by health care professionals receiving Title X funds. Such a prohibition, on its face, violates the First Amendment right

---

6 The Regulations' ban of the word "abortion" from the Title X provider's office arguably has the absurd effect of preventing health care professionals who receive Title X funds from providing their clients with a local telephone reference directory. New York v. Sullivan, 889 F.2d 401, 415 (2d Cir. 1990) (Cardamone, J., concurring); id. at 416-17 (Kearse, J., dissenting in part).

of free speech of these health care professionals.[7]

2. The Regulations Violate The First Amendment By Requiring Title X Providers To Communicate An Anti-Abortion Message To Their Clients

The Regulations not only prohibit health care professionals from counseling women about abortion and providing abortion referrals when requested, 42 C.F.R. § 59.8(b)(5), 53 Fed. Reg. at 2,945, but compel anti-

---

7 Furthermore, it is not the case, as the court below implies, New York v. Sullivan, 889 F.2d at 412, that the Regulations apply only to the use of federal funds. No Title X project is completely funded by federal monies. 42 C.F.R. § 59.11(c). Title X providers are required to receive nonfederal funds equal to at least 10% of the amount provided through Title X. 42 U.S.C. § 300a-4. In fact, federal funds account for only 50% of the monies received by Title X projects. Massachusetts v. Secretary of Health and Human Services, 899 F.2d 53, 59 (1st Cir. 1990). Thus, the Regulations restrict speech paid for by private as well as public monies.

abortion referrals.[8] Thus, in addition to violating the First Amendment's prohibition against content-based speech restrictions, the Regulations violate this prohibition by impermissibly regulating speech on the basis of an anti-abortion viewpoint.

Constitutional principles dictate that the allocation of public funds may not be motivated by the desire to suppress "unacceptable" lawful ideas while subsidizing "acceptable" ones. FCC v. League of Women Voters, 468 U.S. 364,

---

8 The Regulations direct that health care professionals provide pregnant women with information regarding prenatal medical care necessary to protect the health of the "mother" and "unborn child," even when the woman has announced her intention to obtain an abortion, 42 C.F.R. § 59.8(a)(2), 53 Fed. Reg. at 2945, and require that all pregnant women be provided with a list of providers of prenatal care who do not perform abortions. Id. at § 59.8(a)(3), 53 Fed. Reg. at 2938.

383-84 (1984). Through Title X, the government funds the discussion of pregnancy and reproductive health between health care professionals and poor women. Having opened this forum for discussion, the government must maintain strict viewpoint neutrality and ensure that the information given therein is nondiscriminatory. Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 800 (1985).

In FCC v. League of Women Voters, 468 U.S. 364, 383-84 (1984), this Court struck down a ban on editorializing by publicly-funded radio stations because the ban was "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest . . . ." Id. (quoting Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 546

(1980) (Stevens, J., concurring)). Similarly, the Court should strike down the Secretary's attempt to prohibit communications which a health care professional might believe, in his or her professional judgment, is warranted by the client's circumstances, but which the Secretary feels furthers an "unacceptable" viewpoint.

The Regulations cannot be analogized to the government's failure to subsidize the performance of abortions. See Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989); Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977). Although, according to recent decisions of this Court, the government is free to choose which medical services it will fund, id., the government cannot use its funding power to override the First Amendment

rights of health care professionals. The above-cited funding cases do not sanction any interference with the First Amendment rights of these professionals.[9] The Regulations, however, do not merely deny funding for certain medical care, but also force health care professionals to communicate one-sided, government-prescribed information in contravention of their rights of free speech.

"[W]here the State's interest is to disseminate an ideology, no matter

---

9 Webster, Harris and Maher did not address the constitutionality of a funding scheme which regulated the speech of health care professionals. However, in Webster, four Justices noted that if the statute had been interpreted by the state to "prohibit publicly employed health professionals from giving specific medical advice to pregnant women," a serious constitutional issue would have been raised. 109 S. Ct. at 3060 (O'Connor, J., concurring); id. at 3068-69 n.1 (Blackmun, Brennan and Marshall, JJ., concurring in part and dissenting in part).

how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such a message." Wooley v. Maynard, 430 U.S. 705, 717 (1977). By censoring the information that Title X providers may give to their clients, the Regulations impermissibly compel health care professionals -- viewed by their clients as the source of accurate, impartial medical information -- to act as the mouthpiece for the Secretary's disapproval of abortion.

The government created and funded Title X programs expressly to provide a forum for the dissemination of family planning information. The Regulations, however, impose a viewpoint bias on the communications between Title X providers and their clients by funding only those health care professionals who

undertake to express views acceptable to the government. The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech." Perry v. Sindermann, 408 U.S. 593, 597 (1972). See also Sherbert v. Verner, 374 U.S. 398, 405 (1962) ("conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms"). The Regulations impermissibly condition the receipt of a government benefit -- the Title X funds -- on the surrender of the constitutional right to free speech and thereby violate the First Amendment rights of health care professionals.

3. The Speech Prohibited By the Regulations Warrants Particularly Strong Protection Because It Involves Communications Between Health Care Professionals And Their Clients

The violation of the First Amendment's prohibition against content-based speech restrictions is particularly egregious in this case because the Regulations interfere with confidential communications between health care professionals and their clients. The Regulations not only abridge First Amendment rights but substantially interfere with the goals of the health care profession. There is no greater assault on the practice of sound health care than a regulation which restricts free and open communication of lawful medical options between health care professionals and their clients and

thereby effectively compels these professionals to violate their own professional standards.[10]

As in the attorney/client relationship, an essential aspect of the physician/patient relationship is the

---

10 The Regulations would be analogous to a government regulation prohibiting a criminal defense lawyer who is paid with funds appropriated by the Criminal Justice Act, 18 U.S.C. §§ 3006A, et seq. (1985), from counseling his client about his Fifth Amendment right to refuse to testify on the grounds that his testimony may tend to incriminate him. Certainly, for the government to condition a grant of funding to lawyers on the deliberate withholding of advice concerning a course of action which is not only lawful, but constitutionally protected, would not only violate the First Amendment rights of individual lawyers but also would constitute a dangerous assault on the integrity of the legal profession as a whole. However, this is precisely the kind of unacceptable restriction which the Regulations impose on health care professionals practicing in the area of family planning.

ability of the physician and patient to speak openly and freely with one another with the guarantee that the content of their communications will remain confidential.[11] Under the cloak of confidentiality, a physician must provide appropriate counseling and seek informed consent for treatment.

The duty of health care professionals to their clients is no different when the information concerns abortion and its alternatives. Indeed, because of the particularly important

---

11 "The candor which [the promise of confidentiality] elicits is necessary to the effective pursuit of health; there can be no reticence, no reservation, no reluctance when patients discuss their problems with their doctors." Hammonds v. Aetna Cas. and Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965); cf. Hickman v. Taylor, 329 U.S. 495, 510 (1947) ("it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion").

nature of the speech involved in communications between health care professionals and their female clients involving women's exercise of their constitutional right of reproductive choice,[12] this Court has consistently struck down laws that require health care professionals to disseminate biased or incomplete information about abortion. See Akron v. Akron Center for Reproductive Health Inc., 462 U.S. 416, 444-45 (1983) ("By insisting upon recitation of a lengthy and inflexible list of information [the statute] unreasonably has placed 'obstacles in the

---

12 See Roe v. Wade, 410 U.S. 113, 165 (1973) (the abortion decision is "inherently, and primarily, a medical decision"); Akron v. Akron Center for Reproductive Health Inc., 462 U.S. at 443 ("It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances.").

path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.'") (citing Whalen v. Roe, 429 U.S. 589, 604 n.33 (1977)); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 762 (1986) (requirement that a physician provide a woman with a list of agencies offering alternatives to abortion is "nothing less than an outright attempt to wedge the [government's] message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician"). Like the statutes struck down in Akron and Thornburgh, the Regulations place an impermissible "straitjacket" on health care professionals and directly interfere with the delivery of information which is essential to the professional/client

relationship. Thornburgh, 476 U.S. at 762 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 67 n.8 (1976)).

B. By Restricting Communications Between Health Care Professionals And Their Clients, The Regulations Represent An Unprecedented And Unauthorized Intrusion Of Federal Power Into The Health Care Field

In passing Title X, Congress did not intend either to restrict the First Amendment rights of health care professionals or to use appropriated funds as a means of regulating the medical profession. Neither the statute nor its legislative history demonstrates any congressional intent to interfere in the communications between professional and client. Notwithstanding the lack of congressional intent and direction, the Secretary has promulgated unprecedented rules which, as described above, have the direct effect of regulating the

physician/patient relationship in the area of reproductive choice. The Regulations are therefore invalid not only because they transgress established First Amendment freedoms, but because they represent an unprecedented and unauthorized intrusion of federal power into the health care field.

Where an administrative agency has exceeded its authority by promulgating regulations that are inconsistent with congressional intent and "contrary to the manifest purposes of Congress in enacting [the statute]," the regulations are invalid. United States v. Larionoff, 431 U.S. 864, 873 (1977). Here, in adopting Title X, Congress sought, among other things, to provide "comprehensive, voluntary planning services to all persons in the United States," Pub. L. No. 91-572, reprinted in

1970 U.S. Code Cong. & Admin. News (84 Stat. 1504) 1748, so as to "guarantee the right of the family to freely determine the number and spacing of its children with the dictates of its individual conscience." Preamble to S. 2108, 91st Cong., 2nd Sess., reprinted in Cong. Rec. 24093-94, (July 14, 1970). The Regulation directly contravenes the congressional purpose by converting Title X into a platform for dictating the government's view of family planning and by restricting the individual's ability to "freely determine the number and spacing of its children."[13]

---

[13] The statutory basis offered by the Secretary for the Regulations is Section 1008, which forbids funding any program "where abortion is a method of family planning." 42 U.S.C. § 300a-6. This section clearly does not provide a basis for the restrictions on the communications between professionals and clients now at issue.

The scope of a health care professional's duty to communicate with his or her client has historically been determined through state law and professional self-regulation. Whether governed by state laws of informed consent,[14] or the obligations of professional ethics,[15] the health care

---

14 See, e.g., N.Y. Pub. Health Law § 2805-d (McKinney 1985 & Supp. 1988) (requiring health care providers to inform patients of all risks and benefits of a particular mode of treatment); Cobbs v. Grant, 8 Cal.3d 229, 243, 502 P.2d 1, 10, 104 Cal. Rptr 505, 514 (1972) (recognizing a "duty of reasonable disclosure of the available choices with respect to proposed therapy").

15 American Medical Association, Principles of Medical Ethics 8.07 (1986) ("The physician's obligation is to present the medical facts accurately to the patient."); American College of Obstetricians and Gynecologists, Standards for Obstetric-Gynecological Services 76-77 (6th ed. 1985) (requiring, in the event of unwanted pregnancy, that physician counsel patient about her options, including the option of

profession has always provided whatever information is required in order for the patient to choose freely the appropriate treatment. The law and custom that protect professional/client communications are areas where the federal government has never sought to intervene.

Given the history of local and self-regulation of health care professionals and the absence of any indication by Congress that it intended to break with that history, it is clear that Congress has not affirmatively chosen to regulate physician/patient communications. Instead, the Secretary

---

abortion); cf. New York State Bar Association, Lawyer's Code of Professional Responsibility, EC 7-8 ("A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations.").

has abused his rule-making power by intruding on the physician/patient relationship and placing unconstitutional content-based and viewpoint-based restrictions on the most important form of speech employed by the health care profession in a manner which Congress neither mandated nor envisioned.[16]

The Regulations, promulgated under a statute designed to fund family planning services for impoverished women, represent an illegal, as well as unwise, extension of bureaucratic, rule-making power beyond its appropriate sphere. Allowing the Secretary to promulgate these regulations would set a remarkable

---

16 Congressman John Dingell, the sponsor of Section 1008, now suggests that the Secretary may have intentionally "misinterpret[ed] the congressional intent for Title X." Congressman J. Dingell, Letter to Otis Bowen (Oct. 14, 1987) at 2.

precedent for administrative agencies to exercise power not only to restrict protected speech but to dictate novel and uniform standards of care across an entire spectrum of professional activity which Congress has never before sought to occupy and certainly did not intend to invade in enacting Title X.

Conclusion

For the foregoing reasons, the Association, through its Committees on Civil Rights and Medicine and Law, urges this Court to reverse the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,*
Conrad K. Harper
Counsel Of Record
Janice Goodman
Diane S. Wilner
THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 West 44th Street
New York, New York 10036
(212) 382-6600

Deborah M. Buell
Donna Costa
Joseph Ravitch
CLEARY, GOTTLIEB, STEEN
& HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Date: New York, New York
July 27, 1990

* Counsel wish to acknowledge the assistance of law clerks Taina Bien-Aime and Matthew Weil in the preparation of this brief.